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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 85

CITIES SERVICE GAS COMPANY, A CORPORATION,
APPELLANT

v.

STATE CORPORATION COMMISSION OF KANSAS, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (R. 90–102) is reported at 180 Kan. 454, 304 P. 2d 528. with the Memorandum Opinion of the State Corporation Commission of Kansas (R. 45–51) printed as an appendix thereto. The Gas Price Fixing Order of the State Corporation Commission of Kansas is set out in the Record at R. 39–45.

JURISDICTION

The judgment of the Supreme Court of Kansas was entered on December 8, 1956 (R. 90–102). Appel-

lant's motion for rehearing was denied on January 4, 1957 (R. 109). Notice of appeal was filed on January 18, 1957 (R. 110–112), and the appeal was docketed in this Court on February 25, 1957. Probable jurisdiction was noted on May 27, 1957. 353 U. S. 971. The jurisdiction of this Court rests on 28 U. S. C. 1257 (2).

QUESTIONS PRESENTED

1. Whether sales of natural gas in interstate commerce for resale, made at the wellhead or prior to the completion of gathering, are subject to regulation by the Federal Power Commission under the Natural Gas Act.

2. Whether the State of Kansas can lawfully fix a minimum price at the wellhead to be charged for, or attributed to, natural gas where such gas is sold in interstate commerce for resale, either at the wellhead or after the completion of production and gathering.

STATUTES AND ORDERS INVOLVED

Section 1 (b) of the Natural Gas Act of June 21, 1938, 52 Stat. 821, 15 U. S. C. 717 (b), provides:

> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The pertinent Kansas statutes are set out in Appendices A and B of appellant's brief (pp. i-viii). The Gas Price Fixing Order of the State Corporation Commission of Kansas, entered December 2, 1953, and effective January 1, 1954 (R. 39–45), is set out in full in Appendix C of appellant's brief (pp. ix-xvi). The order provides in pertinent part:

> That all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas on or after January 1, 1954, 12:01 A. M., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, leaseowners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per Mcf. (14.65# psia.) at the wellhead until further order or orders of this Commission (R. 4, 39–45).

STATEMENT

Appellant, a natural gas company within the meaning of the Natural Gas Act, 15 U. S. C. 717, *et seq.*, has appealed to this Court from a decision of the Supreme Court of Kansas sustaining the validity of an order of the State Corporation Commission of Kansas which set a minimum price of eleven cents per thousand cubic feet at the wellhead for natural gas taken from the Kansas-Hugoton Gas Field. The federal question presented by this appeal is whether the State Commission's order is unlawful because it conflicts with the exclusive jurisdiction of the Federal Power Com-

mission under the Natural Gas Act to regulate the rates at which natural gas is sold in interstate commerce for resale. Believing that the State Commission has no authority to regulate wellhead prices of natural gas which is sold for resale in interstate commerce, the Federal Power Commission, as *amicus curiae,* urges reversal of the decision below.

The facts, which are set out in detail in the appellant's brief, may be summarized as follows:

Appellant produces and purchases natural gas for transportation in interstate commerce for resale through an integrated pipeline system extending from Texas into and through Oklahoma and Kansas and into Missouri and Nebraska (R. 5, 68–69, 79). Appellant's integrated pipeline system has been certificated as an interstate transmission facility by the Federal Power Commission (see Re: *Cities Service Gas Company,* Docket G–729, 6 F. P. C. 701, *et seq.,* and Docket G–298, 4 F. P. C. 471–472), and its sales in interstate commerce for resale are made under rates accepted for filing by the Federal Power Commission (R. 5, 68, 79, Ex. 34).

Appellant owns no wells or production facilities in the Kansas portion of the Hugoton Gas Field (R. 7), but, as an integral part of the operation of its interstate pipeline system, purchases natural gas from producers in the Kansas-Hugoton Field under subsisting long-term contracts (R. 5–10, 68–69, 80–81, 204, 215). Part of the gas so purchased is delivered by the producers to appellant at the wellhead, and the remainder is delivered to appellant's pipeline in the field after

gathering by the producer (R. 6–7, 81). In 1951, 55.4 percent of the gas purchased by appellant in the Kansas-Hugoton Field was delivered at the wellhead, and 44.6 percent was delivered after the completion of production and gathering (R. 6–7, 81). Approximately 74 percent of the total amount of this gas was processed by the producer for the extraction of hydrocarbons (*ibid.*).

Appellant's principal markets are in Kansas, Missouri, and Oklahoma (R. 5). It obtains its supply of gas for these markets from four principal sources (R. 19), the most important of which are the Oklahoma and Kansas portions of the Hugoton Field (R. 15). Approximately 31 percent of its total gas supply is produced in the Kansas-Hugoton Field (R. 19). Gas from all four sources is commingled in appellant's pipeline system so that it is impossible at the market ends of the pipelines to identify gas as coming from any particular source (R. 15–19). It is estimated, however, that only 48.5 percent of the volume of the gas purchased by appellant in the Kansas-Hugoton Field in 1952 was consumed in Kansas (R. 18–19); hence, more than half of the Kansas-Hugoton gas purchased by appellant was transported and sold for resale outside the State of Kansas.

On December 2, 1953, after hearing, the Corporation Commission of the State of Kansas issued an order setting minimum prices for natural gas taken from the Kansas-Hugoton Gas Field (R. 39–45). This order required that all persons who "take gas or cause gas to be taken" from the Field after January 1, 1954,

"shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes * * * the fair and reasonable minimum price of not less than eleven cents (11¢) per Mcf. (14.65# psia.) at the wellhead * * *." This minimum price of eleven cents per thousand cubic feet was substantially higher than the prices at which appellant had contracted for natural gas under subsisting long-term contracts with producers in the Kansas-Hugoton Field (R. 5–10, 68–69, 80, 81, 204, 215). The impact of the State Commission's order, based upon appellant's estimated purchases for 1953, was to increase appellant's gas costs by approximately $4,000,000.00 annually (Appellant's Br. 7; R. 13–14, Ex. 46, R. 86–87).

Appellant's petition for rehearing of this order (R. 51–66) was denied by the State Commission (R. 67), and appellant, challenging its validity, sought review of the order in the District Court of Finney County, Kansas (R. 68). The validity of the order was sustained by the District Court (R. 75–76), and, upon appellant's appeal (R. 78), by the Supreme Court of Kansas (R. 90–102). The Kansas Supreme Court held (R. 99) that the State Commission's order was a valid exercise of the power to regulate the physical production and gathering of natural gas in the interest of conservation. The court rejected appellant's contention that the State order was an invalid invasion of the Federal Power Commission's exclusive jurisdiction under the Natural Gas Act to regulate sales of natural gas in interstate commerce for resale. It held

(R. 99) that the challenged order "falls squarely within" the language of Section 1 (b) of the Natural Gas Act providing that the Act shall not apply, *inter alia*, "to the production or gathering of natural gas." The court distinguished the holding of this Court in *Natural Gas Pipeline Co.* v. *Panoma Corporation*, 349 U. S. 44, on the ground that the Oklahoma order which the Court held invalid in *Panoma* attempted to fix a minimum price for natural gas which was sold after its production and gathering had ended, while the Kansas order here involved fixed a minimum price to be paid for or attributed to gas before cessation of production (R. 101).

SUMMARY OF ARGUMENT

I

Appellant, an interstate pipeline company and a natural gas company under the Natural Gas Act, purchases natural gas for resale in interstate commerce from producers in the Kansas-Hugoton Gas Field. While some of the sales to appellant are made at the wellhead, and others at a later stage of the ultimate interstate transmission of the gas, all of the sales are subject to regulation by the Federal Power Commission. This Court has held that Section 1 (b) of the Natural Gas Act confers jurisdiction upon the Commission over "all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company." *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 682. The Power Commission's juris-

diction, as so interpreted, clearly extends to sales by producers made at the wellhead, as well as to sales made after production and gathering have been completed. Wellhead sales are plainly sales in "interstate commerce," and, like any other such wholesales, their rates "have a direct and substantial effect on the price paid by the ultimate consumers." 347 U. S. at 685.

Power Commission jurisdiction over wellhead sales is in no way impaired by the exemption in Section 1 (b) of "the production or gathering of natural gas." This language has been consistently interpreted as referring only to the "physical activities, facilities, and properties" used in the production and gathering of the gas (347 U. S. at 678), and has no effect upon the jurisdiction of the Federal Power Commission to regulate all *sales* of natural gas in interstate commerce, whether or not they take place prior to the completion of gathering.

II

The order of the Kansas Corporation Commission fixes a minimum wellhead price for all natural gas taken from the Kansas-Hugoton Field and thus directly conflicts with the exclusive jurisdiction of the Federal Power Commission to regulate wholesales of natural gas by producers to interstate pipeline companies. This Court held in *Natural Gas Pipeline Co. v. Panoma Corporation*, 349 U. S. 44, 45, that a state minimum price order applying to sales of natural gas in interstate commerce is invalid because such sales "are subject to the exclusive regulation of the Federal

Power Commission." The Kansas order is substantially identical to the Oklahoma order invalidated in *Panoma,* and has precisely the same prohibited effect upon interstate commerce. By requiring producers to charge a minimum rate in selling their gas to pipeline companies such as appellant, the state order effectively undercuts the right of the Power Commission to regulate the maximum price for such sales—a right which the Power Commission is exercising by regulation and by proceedings against independent producers. Accordingly, the Kansas order is invalid.

ARGUMENT

I

ALL WHOLESALES OF NATURAL GAS FOR RESALE IN INTERSTATE COMMERCE MADE TO APPELLANT BY PRODUCERS IN THE KANSAS-HUGOTON FIELD ARE SUBJECT TO REGULATION BY THE FEDERAL POWER COMMISSION

Section 1 (b) of the Natural Gas Act, *supra,* p. 2, declares that the provisions of the Act shall apply "to the sale in interstate commerce of natural gas for resale for ultimate public consumption," but not "to the production or gathering of natural gas." As interpreted by this Court, Section 1 (b) confers exclusive jurisdiction upon the Federal Power Commission to regulate all sales of natural gas for resale in interstate commerce, including those made at the wellhead, prior to the completion of gathering. Both the language and the purposes of the statute require such regulation, and there is no basis in the Act for excluding such sales from the Power Commission's jurisdiction. Accordingly, all of the sales made to appellant,

an interstate pipeline company and a "natural gas company" under the Act, by producers in the Kansas-Hugoton Field are subject to regulation by the Power Commission, whether such sales are made before or after the completion of the gathering process.

A. THE PRIMARY PURPOSE OF THE NATURAL GAS ACT IS TO SUBJECT ALL SALES OF NATURAL GAS IN INTERSTATE COMMERCE FOR RESALE TO REGULATION BY THE FEDERAL POWER COMMISSION

1. In *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, this Court unequivocally held that the Natural Gas Act conferred exclusive jurisdiction upon the Federal Power Commission to regulate all sales of natural gas for resale in interstate commerce. The precise question decided by the Court in *Phillips* was that wholesales in interstate commerce made by producers and gatherers of natural gas (the so-called "independent" producers) are subject to the Natural Gas Act despite the fact that they are engaged only in production and gathering of gas, operations which as such are not subject to the Commission's jurisdiction. While the sales involved in *Phillips* happened to be made after the completion of gathering, the Court's decision did not turn on that fact. Rather, the Court based its ruling on the broader ground that the Act covered "all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company" (347 U. S. at 682).

That the *Phillips* holding was based on this broader ground is, we submit, manifest throughout the opin-

ion. In discussing its earlier holding in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, where Interstate had produced or purchased natural gas which it in turn sold and delivered to three interstate pipeline companies, the Court not only reaffirmed its prior ruling that "'[e]xceptions to the primary grant of jurisdiction in the section [1 (b)] are to be strictly construed' *id.* at 690–691" (347 U. S. at 679), but it deliberately refused to distinguish *Interstate* on the proffered ground that that company "transported the gas in its pipelines after completion of gathering and before sale, and that the Interstate Company was affiliated with an interstate pipeline company and therefore subject to Commission jurisdiction in any event" (347 U. S. at 680). In *Phillips,* the Court stated with respect to *Interstate* (*id.* at 680–681):

> * * * This Court, however, refused to rely on such refinements and instead based its decision in *Interstate* on the broader ground that sales in interstate commerce for resale by producers to interstate pipeline companies do not come within the "production or gathering" exception.

Similarly, in dealing with the Act's legislative history, the Court pointed out that wholesale sales generally, not merely those made after the completion of gathering or by pipeline companies, were within the "gap" which the Natural Gas Act was intended to "plug" (*id.* at 683–689):

> * * * A significant part of this gap was created by cases holding that "the regulation of wholesale rates of gas and electrical energy

> moving in interstate commerce is beyond the constitutional power of the States." *Interstate Natural Gas Co.* v. *Federal Power Commission, supra,* at 689. The committee reports on the bill that became the Natural Gas Act specifically referred to two of these cases and to the necessity of federal regulation to occupy the hiatus created by them. Thus we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems.

Finally, the Court expressly recognized that the effect of its holding would be to subject to Power Commission regulation wholesales of natural gas in interstate commerce for resale by independent producers wherever, as here, the rates charged for such gas directly affect the price paid by the ultimate consumers (*id.* at 685):

> Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co., supra,* at 610. Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal legislation have repeatedly failed, and we refuse to achieve the same result

by a strained interpretation of the existing statutory language.

2. The *Phillips* decision establishes that the purposes of the Natural Gas Act can be attained only if the Federal Power Commission is in a position to regulate all of the sales to appellant in the Kansas-Hugoton Field, including wellhead sales. This Court has recognized that Congress intended an effective, not merely nominal, regulation of natural gas prices. *Phillips Petroleum Co.* v. *Wisconsin, supra; Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610. And effective regulation of "wholesales of natural gas occurring at both ends of the interstate transmission systems" (*Phillips Petroleum Co.* v. *Wisconsin, supra,* 347 U. S. at 684) plainly requires that the Power Commission's jurisdiction extend to the rates charged at the wellhead by independent producers. More than half of the gas purchased by appellant in the Kansas-Hugoton Field is sold in interstate commerce (R. 18–19), and the wellhead rates for this gas obviously have "a direct and substantial effect on the price paid by the ultimate consumers" (*Phillips, supra,* 347 U. S. at 685).[1] As this

[1] Thus, on the basis of the order of the State Corporation Commission of Kansas fixing a wellhead price of eleven cents per thousand cubic feet for natural gas taken from the Kansas-Hugoton Field, Magnolia Petroleum Company, one of the independent producers from which appellant purchases natural gas at the wellhead, has filed rates with the Federal Power Commission which incorporate the Kansas minimum price in its charges to the appellant. Appellant in turn has made application for adjustment of its rates, and is now by Power Commission order receiving increased rates from natural gas distributors which

Court held, only by regulation of the initial wholesales in interstate commerce can the Commission achieve the "[p]rotection of consumers against exploitation at the hands of natural-gas companies [which] was the primary aim of the Natural Gas Act" (*ibid.*).

The Federal Power Commission has taken this position uniformly since the decision in the *Phillips* case. Its series of "174" orders, commencing July 16, 1954, provide for regulation of the prices charged by all independent producers selling natural gas for resale in interstate commerce, whether the sales are made at or near the wellhead or at some later stage in interstate transmission. See, *e. g., Magnolia Petroleum Co. v. Federal Power Commission*, 236 F. 2d 785, 787–790 (C. A. 5), certiorari denied, 352 U. S. 968.[2] As we show below (*infra*, pp. 17–23), these orders are within the permissible scope of the Power Commission's jurisdiction; they are also clearly justified as a practical matter. Approximately half of appellant's purchases in the Kansas-Hugoton Field are made at the wellhead and the other half after the completion of gathering (R. 6–7, 81). All of this gas is commingled in appellant's integrated interstate pipeline

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compensate it for the higher prices it must pay Magnolia and the other producers. *Cities Service Gas Co.*, Docket G-2410, G-9468, Order issued May 25, 1956. Undoubtedly, this increase has already been passed on in whole or in part to the ultimate consumers.

[2] Since the *Phillips* decision, the Power Commission has been very active in the regulation of independent producers and their sales in interstate commerce. For the details of the Commission's activity, see Appendix A, *infra*, pp. 35 *ff.*

system, and the impact of each type of sale upon the "price paid by the ultimate consumers" is precisely the same. An artificial distinction exempting the wellhead sales from Power Commission jurisdiction would not only create substantial practical difficulties in administration, but also cripple the effective regulation required by the Natural Gas Act.[3]

The Power Commission's view of its own jurisdiction has been sustained by the Court of Appeals for the Fifth Circuit in recent decisions in *Deep South Oil Co. of Texas* v. *Federal Power Commission*, 247 F. 2d 882, *Shell Oil Company* v. *Federal Power Commission*, 247 F. 2d 900, *Humble Oil & Refining Company* v. *Federal Power Commission*, 247 F. 2d 903, and *Continental Oil Co.* v. *Federal Power Commission*, 247 F. 2d 904, all decided on June 29, 1957. (Petitions for certiorari are now pending before this Court in the *Shell* and *Humble* cases, Nos. 449 and 459, October Term, 1957.) In its *Deep South* decision, the principal opinion in the three cases, the Court of Appeals held that independent producers who sold natural gas to interstate pipeline companies for resale were "natural gas companies" subject to Power Commission regulation under the Act notwithstanding the fact that these sales were made at the wellhead, prior to completion of the gathering process.[4] The Court of Ap-

[3] The artificiality of drawing a distinction between a sale in which title passes at the wellhead and one where title passes only after the gas has passed through gathering facilities owned by the producer is considered further *infra*, pp. 17–23.

[4] The Court of Appeals, after quoting extensively from this Court's *Phillips* decision to the effect that the language and history of the Natural Gas Act contemplated regulation of all sales by

peals for the Third Circuit in *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F. 2d 550, certiorari denied, 352 U. S. 971, has likewise recognized the broad regulatory powers of the Power Commission over all aspects of wholesales of natural gas in interstate commerce. In holding that an independent producer could not abandon sales to an interstate pipeline company without approval by the Commission, the court reasoned that Commission control over abandonment of both the sales and the underlying sales facilities—including the producer's T-valve system, its valves and the pipe—was appropriate to the extent necessary to permit effective regulation of the sales themselves. 236 F. 2d 556. And very recently, on November 20, 1957, the Tenth Circuit affirmed the Power Commission's assertion of jurisdiction to certificate a wellhead sale; the Court of Appeals' decision (reprinted in Appendix B, *infra*, pp. 47–62), which involves the wellhead sales of a small independent Kan-

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independent producers for resale in interstate commerce, went on to state (247 F. 2d at 887):

> Having in mind the obvious purpose of Congress which was to see that there was effective regulation of all interstate wholesale sales of natural gas, it would be an exceedingly incongruous result if a statute so motivated and planned to bring about such regulation were construed so as to obtain the opposite result. To hold, as petitioner would have us do, that it may set up its own interests in complete freedom from regulation of the price of its wholesale sales would be to permit it, if it were so inclined, to engage in the very exploitation which the Act was designed to prevent. We cannot therefore subscribe to the view that the Act contemplates that petitioner or any other independent producer should be free of price regulation, if it is engaged in the sale in interstate commerce of natural gas for resale.

sas producer, is squarely in conflict with the decision below. *Saturn Oil & Gas Company, Inc.* v. *Federal Power Commission*, C. A. 10, No. 5582, Nov. Term, 1957, decided November 20, 1957.

B. SALES OF NATURAL GAS MADE AT THE WELLHEAD PRIOR TO THE COMPLETION OF PRODUCTION AND GATHERING ARE SUBJECT TO REGULATION UNDER THE NATURAL GAS ACT

We have just shown (*supra*, pp. 10–17) that the over-all purpose of the Natural Gas Act requires that all of the sales to appellant from the Kansas-Hugoton Field, including the wellhead sales, be regulated by the Federal Power Commission. There are no statutory obstacles to the attainment of this broad over-all objective. The Power Commission's jurisdiction over wellhead sales is in no way impaired by the fact that these sales are made in the field, prior to the completion of gathering. Sales made at the wellhead are not "local" in character, but are wholesales "in interstate commerce" within the meaning of the Act, and as such are necessarily subject to Power Commission jurisdiction. Moreover, they are not exempted from regulation by the "production or gathering" exception of Section 1 (b) of the Act; this language refers only to physical facilities, properties and activities underlying the sales and does not affect the jurisdiction of the Power Commission over the sales themselves.

1. Sales of natural gas at the wellhead for resale in interstate commerce are clearly sales "in interstate commerce" within the meaning of the Natural Gas Act. This Court has made clear that the sale of gas originating in one state, and its transmission and de-

livery to distributors in any other state, constitutes interstate commerce. See *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, 684–685; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 163; *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U. S. 575, 582; cf. *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 467. As the Court of Appeals for the Fifth Circuit pointed out in the *Deep South* case, *supra* (247 F. 2d 882, 887–888):

> The fact that the sales are made at the wellhead is immaterial for the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to the ultimate interstate destination, does not affect the essential interstate nature of the business. Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498, 503–504 * * *. Here, petitioner's own brief testifies eloquently to the continuous movement of the gas which it sells at the wellhead. * * * Accordingly, and in the light of all of the uncontroverted facts, we hold that when the gas was sold by petitioner it had commenced its journey in interstate commerce.

See also the Tenth Circuit's opinion in *Saturn Oil & Gas Company*, Appendix B, *infra*, p. 47.

In the present case, too, there is no question of the ultimate interstate destination of the major portion of appellant's purchases in the Kansas-Hugoton Field, and, in view of the practical impossibility of distinguishing this gas from that which is sold in Kansas, there can be no question but that all of the sales to appellant, including those at the wellhead, are made

"in interstate commerce" within the meaning of the Act.[5]

2. It is also clear that sales to appellant at the wellhead are not exempted from Power Commission regulation under the provision in Section 1 (b) excluding from the Act's coverage "the production or gathering of natural gas." This clause has been consistently interpreted, both by this Court and the courts of appeals, to refer only to the regulation of the physical activities, properties, and facilities employed in producing or gathering natural gas. It has no bearing on the jurisdiction of the Federal Power Com-

[5] The fact that some gas was processed after sale and delivery to appellant's interstate pipeline company does not operate to remove the gas or the sale from interstate commerce. The processing of the gas, by passing it through several facilities for the removal of impurities and heavier hydrocarbons without stoppage, is not a manufacturing operation (cf. *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U. S. 49, 52–54), nor is it an interruption of the stream of commerce. To the contrary, the processing of the gas is undertaken only to facilitate transmission and use, and, as such, it is an "essential part of the business of transporting and marketing the natural gas" (*Cities Service Gas Co.* v. *Federal Power Commission*, 155 F. 2d 694, 703 (C. A. 10), certiorari denied, 329 U. S. 773), an "incident to the overall pipeline transmission and resale operations" (*City of Detroit, Michigan* v. *Federal Power Commission*, 230 F. 2d 810, 820 (C. A. D. C.), certiorari denied, 352 U. S. 829). Moreover, since it is established that, for the purposes of federal regulation, interstate commerce is not interrupted even where there is a stoppage for processing (see *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 238; *Parker* v. *Brown*, 317 U. S. 341; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148; *Stafford* v. *Wallace*, 258 U. S. 495, 514–516), it follows *a fortiori*, that, where, as here, the processing does not involve any stoppage, the interstate movement is not interrupted.

mission to regulate *sales* of natural gas for resale in interstate commerce, whether such sales are preceded or followed by the "gathering" of the gas.

In holding that the broad language of Section 1 (b) of the Natural Gas Act brings within the coverage of the Act "all wholesales of natural gas in interstate commerce" (347 U. S. at 682), the *Phillips* decision emphasized that " '[e]xceptions to the primary grant of jurisdiction in the section [1 (b)] are to be strictly construed'. [*Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690–691]" (347 U. S. at 679). Pointing out that the *Interstate Natural Gas* decision had rested on the broad ground "that sales in interstate commerce for resale by producers to interstate pipeline companies do not come within the 'production or gathering' exemption" (347 U. S. at 680–681), *Phillips* made clear the limited scope of this exception. It held that the "natural and clear meaning" of production and gathering as used in Section 1 (b) is that these words apply only "to the physical activities, facilities, and properties used in the production and gathering of natural gas" (347 U. S. at 678), and the Court expressly refused to construe the phrase "to mean the 'business' of production and gathering, with the sale of the product considered as an integral part of such 'business' " (347 U. S. at 681). See also *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 598; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 612–615; *Peoples Natural Gas Co.* v. *Federal Power Commission*, 75 App. D. C. 235, 127 F. 2d 153; cf.

United States v. *Public Utilities Commission*, 345 U. S. 295, 307–311.

Particularly in point is the *Colorado Interstate* decision, which sustained the right of the Power Commission, in fixing the rates for interstate wholesale sales of an integrated pipeline company, to include the company's production and gathering facilities in the rate base. Reading "§ 1 (b) in the context of the whole Act" (324 U. S. at 602), the court found that the Section 1 (b) exemption prohibited Commission control over the physical activity of producing and gathering itself ("the drilling and spacing of wells and the like") but did not "preclude the Commission from reflecting the production and gathering facilities in the rate base" (324 U. S. at 602–603). The opinion recognizes that this "treatment of producing properties and gathering facilities has of course an indirect effect upon them" (324 U. S. at 603), but makes clear that these underlying facilities may be referred to to accomplish a valid regulatory end.* By a parity of reasoning, the exclusion in Section 1 (b) of the physical production and gathering activity in no way prohibits the Commission from regulating the sales of gas at the wellhead; the Commission is not controlling the physical use of properties and facilities, but is simply "referring" to them where necessary to accom-

* See also *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. at 691:

> It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may be in some degree affected.

plish the statute's primary purpose of effective regulation of interstate sales of natural gas.[7]

The Courts of Appeals for the Third, Fifth, and Tenth Circuits, in cases decided subsequent to *Phillips*, have likewise expressly rejected the contention that the "production or gathering" exemption restricts the Power Commission's jurisdiction effectively to regulate rates of wholesales of natural gas in interstate commerce. *J. M. Huber Corporation* v. *Federal Power Commission*, C. A. 3, *supra*, pp. 15–16; *Deep*

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[7] *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, is not to the contrary. The question there was whether a pipeline could abandon certain gas leaseholds underlying its interstate service. The leased acreage which the company sought to dispose of was undeveloped and thus remote from its current operations. This Court rejected the Commission's attempt to distinguish between the activities of production and gathering, concededly exempt from regulation, and the facilities (such as gas leases) used therefor. It held that the statutory exclusion comprehended both the producing properties and gathering facilities of a natural gas company, and concluded that to extend the Commission's jurisdiction into what was an "essential part of production" (337 U. S. at 505) would be inconsistent with the "production and gathering" exemption. Here, however, the question is not Commission control of either the activities or the facilities of production and gathering, but simply its jurisdiction to regulate rates of natural gas to be resold in interstate commerce, a matter over which it has broad authority. The *Phillips* decision in fact cites *Panhandle Eastern* for the proposition that the "production or gathering" exemption encompasses only the physical producing properties and gathering facilities of a natural gas company (347 U. S. at 678). And cf. *J. M. Huber Corporation* v. *Federal Power Commission*, *supra*, which held that, notwithstanding the production or gathering exemption, an independent producer could abandon neither its sales to an interstate pipeline company nor the facilities underlying these sales without Commission approval.

South Oil Co. of Texas v. *Federal Power Commission*, and related cases, C. A. 5, *supra*, p. 15; *Saturn Oil & Gas Company, Inc.* v. *Federal Power Commission*, C. A. 10, *supra*, pp. 16–17; *infra*, pp. 47–62. The Fifth Circuit pointed out in its *Deep South* opinion (247 F. 2d at 889):

> The exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natural gas are not within the commission's power of regulation. However, there is nothing in the Act which suggests, either expressly or by implication, that by the exemption of production and gathering, Congress intended that the wholesale sales of natural gas in interstate commerce which are consummated before the gas has been gathered or processed should not be regarded as sales in such commerce over which the Commission was granted exclusive jurisdiction to regulate.

And the Third Circuit, relying upon the *Phillips* decision, held in *Huber* that the "production or gathering" exclusion in no way restricted the power of the Power Commission under Section 7 (b) of the Act to prohibit a producer who was selling natural gas to an interstate pipeline company from abandoning either his sales or the facilities underlying them. 236 F. 2d 550, 554–556. See also the Tenth Circuit's recent opinion in *Saturn Oil & Gas Company*, Appendix B, *infra*, pp. 51–62, with respect to the "production and gathering" exception.

II

THE ORDER OF THE KANSAS CORPORATION COMMISSION FIXING A MINIMUM WELLHEAD PRICE FOR ALL NATURAL GAS TAKEN FROM THE KANSAS-HUGOTON FIELD IS INVALID BECAUSE IT CONFLICTS WITH THE EXCLUSIVE JURISDICTION OF THE FEDERAL POWER COMMISSION TO REGULATE WHOLESALES OF NATURAL GAS IN INTERSTATE COMMERCE

As we have shown in Point I, *supra,* pp. 9–23, the Federal Power Commission is vested with jurisdiction under the Natural Gas Act to regulate the rates of all sales to appellant from the Kansas-Hugoton Field, whether made at the wellhead or at some later stage in the continuous flow of the gas in interstate commerce. *Phillips* establishes that the producers of the natural gas sold at the wellhead to appellant are themselves "natural gas companies" as defined by the Act, and their sales at wholesale to appellant are subject to regulation by the Federal Power Commission. The order of the Kansas Corporation Commission fixing a minimum wellhead price of eleven cents per Mcf. for all gas taken from the Field directly conflicts with these exclusive regulatory powers of the Power Commission. By requiring producers to charge this *minimum* rate in sales to interstate pipeline companies such as appellant, the state order effectively undercuts the right of the Commission to regulate the *maximum* price for such sales. This Court has recently invalidated a substantially identical Oklahoma minimum price order for precisely this reason, *Natural Gas Pipeline Co.* v. *Panoma Corporation,* 349 U. S. 44, and the Kansas order here is equally invalid.

A. A STATE NOW HAS NO POWER TO FIX MINIMUM PRICES FOR WHOLESALES OF NATURAL GAS IN INTERSTATE COMMERCE

1. This Court's decision in *Natural Gas Pipeline Co.* v. *Panoma Corporation* and *Natural Gas Pipeline Co.* v. *Corporation Commission of Oklahoma,* 349 U. S. 44, has made clear that a state is now without power to fix minimum prices to be paid for natural gas by an interstate pipeline company such as the appellant. *Panoma* involved an order of the Oklahoma Corporation Commission providing that "no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price at the wellhead of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch." *Natural Gas Pipeline Co.* v. *Panoma Corporation,* 271 P. 2d 354, 363.* Although the order had

*The price-fixing portion of the later order involved in *Natural Gas Pipeline Co.* v. *Corporation Commission of Oklahoma* was somewhat more elaborate, providing as follows (272 P. 2d 425 at 432-433):

> It Is Therefore Ordered by the Corporation Commission of the State of Oklahoma as follows:
>
> 1. That no gas shall be produced from any well located in the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262¢ per thousand cubic feet if sold at the wellhead or on the lease or drilling unit from which produced, or a price equivalent to not less than 9.8262¢ per thousand cubic feet at the wellhead if sold off the lease or drilling unit or otherwise utilized. If the gas is sold during or upon conclusion of gathering without being processed for the extraction of liquid hydrocarbons, the price shall be not less than 9.8262¢ per thousand cubic feet plus the reasonable cost of gathering. If the gas is processed for extraction of liquid hydrocarbons and sold during

previously been sustained as a valid conservation measure, *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U. S. 179 and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, the decisions in those cases expressly pretermitted the question of a possible conflict with federal authority under the Natural Gas Act. This latter issue was squarely presented in *Panoma*, and, on the basis of *Phillips Petroleum Co.* v. *Wisconsin, supra*, this Court held the state order invalid because it conflicted with the "exclusive" jurisdiction of the Federal Power Commission to regulate wholesales of natural gas in interstate commerce. The Court's brief *per curiam* opinion reads as follows (349 U. S. at 44–45):

> In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce. We held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, that such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission. The *Phillips* case, therefore, controls this one.

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or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262¢ per thousand cubic feet. This same order was involved in *Michigan-Wisconsin Pipe Line Co.* v. *Corporation Commission* (No. 320, October Term, 1954), and *Panhandle Eastern Pipe Line Co.* v. *Corporation Commission* (No. 322, October Term, 1954). These cases were consolidated in the Oklahoma Supreme Court with *Natural Gas Pipeline Co. of America* v. *Corporation Commission*, *supra*, and were reversed by this Court in a *per curiam* opinion on the authority of the *Panoma* decision. 349 U. S. 90.

> We disagree with the contention of the appellees that *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, are applicable here. In those cases we were dealing with constitutional questions and not the construction of the Natural Gas Act. The latter question was specifically not passed upon in those cases.
>
> *Reversed.*
>
> MR. JUSTICE DOUGLAS, being of opinion that State regulation of price is permissible until the Federal price regulation permitted by *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, is imposed, dissents.

The *Panoma* decision leaves no doubt that a state is without power to regulate the prices of any sales of natural gas for resale in interstate commerce. Although the sales of the gas in *Panoma* were made "after its production and gathering has ended * * *," 349 U. S. at 44, the decision of course applies to all sales over which the Federal Power Commission has jurisdiction. Since, as we have shown in Point I, *supra*, pp. 9–23, all wholesales of natural gas in interstate commerce are subject to Commission jurisdiction, whether made before or after completion of gathering, it follows that none of these sales can be regulated by a state.

2. *Panoma* also shows that this Court's decisions in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, are not to the contrary. They dealt only with the constitutionality of state minimum price or-

ders, justified as conservation measures, applying to sales of natural gas in interstate commerce. The question of whether the Natural Gas Act should be construed as asserting paramount federal authority over such sales was "specifically not passed upon in those cases." *Panoma, supra,* 349 U. S. at 45. Thus, in *Phillips,* which did decide the question, this Court, in holding that the Natural Gas Act gave the Federal Power Commission "jurisdiction over the rates of all wholesales of natural gas in interstate commerce" (347 U. S. at 682), pointed out that the scope of the Commission's exclusive jurisdiction was in no way diminished by the fact that *Cities Service* and *Phillips Petroleum Co.* v. *Oklahoma* held that the state had the constitutional right to regulate certain natural gas prices in the absence of conflicting federal regulation.[9] As the Court stated (347 U. S. at 684–685):

> The Federal Power Commission did not participate in the *Cities Service* and *Phillips Petroleum* cases, the appellants there did not assert a possible conflict with federal authority under the Natural Gas Act, and consequently we expressly refused to consider at that time "[w]hether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states * * *." 340 U. S. at 188–189.

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[9] The *Phillips* opinion noted that the "gap" which the Natural Gas Act was intended to fill "is that thought to exist at the time the * * * Act was passed, and the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities in the absence of conflicting federal regulation." 347 U. S. at 684.

B. THE PRICE-FIXING ORDER OF THE KANSAS CORPORATION COMMISSION DIRECTLY AFFECTS THE PRICE OF NATURAL GAS SOLD IN INTERSTATE COMMERCE, AND IS THEREFORE AN INVALID EXERCISE OF STATE AUTHORITY

Finally, it is undeniable that the order of the Kansas Corporation Commission fixing the wellhead price to be charged for, or attributed to, natural gas which is sold to appellant for resale in interstate commerce squarely conflicts with the exclusive jurisdiction of the Federal Power Commission to regulate all such wholesales of natural gas. The Kansas order is in every pertinent respect identical with the Oklahoma order which this Court invalidated in *Panoma,* and is clearly incompatible with effective federal regulation. Since, as we have shown in Point I, *supra,* all of the sales to appellant in the Kansas-Hugoton Field are subject to Federal Power Commission jurisdiction,[10] the Kansas price-fixing order cannot validly be applied to any of these sales.

1. A comparison of the Kansas order with the invalid order of the Oklahoma Corporation Commission in the *Panoma* case demonstrates that in every significant aspect the two orders are identical. As noted above (*supra,* pp. 25–26), the Oklahoma order provides that "no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price at the wellhead of less than 7¢ per thousand cubic feet * * *." The Kansas order (*supra,* p. 3) likewise fixes a minimum wellhead price, requiring that all

[10] As shown in detail in Appendix A, *infra,* pp. 35 *ff.* the Power Commission is actively undertaking the regulation of sales in interstate commerce by independent producers.

persons taking natural gas from the Kansas-Hugoton Field "pay or attribute to all gas taken * * * the fair and reasonable minimum price of not less than eleven cents (11¢) per Mcf. (14.65# psia.) at the well-head * * *." Both orders are framed as conservation measures, but both have precisely the same "direct and substantial effect on the price paid by the ultimate consumers" (*Phillips, supra,* 347 U. S. at 685). We submit that both orders are equally invalid.[11]

2. We do not, of course, rely simply on the identity of the Oklahoma and Kansas orders in urging the latter's invalidity. No different result would obtain if the Kansas order differed in content or scope from the order in *Panoma*. *Panoma* holds that the Federal Power Commission has "exclusive" jurisdiction to regulate sales of natural gas for resale in interstate commerce, 349 U. S. at 45, and any action by a state

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[11] The distinction which the court below purports to make between the Kansas and Oklahoma orders is based upon a misreading of *Panoma*. The decision below notes that *Panoma* refers to the Oklahoma order as an attempt "to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce," 349 U. S. at 44, and distinguishes the Kansas order because it "fixed a minimum price to be paid for gas before cessation of production" (R. 101). But a reading of the Oklahoma order immediately demonstrates that the incidence of both price-fixing orders was precisely the same: the Oklahoma order purported to fix the price for gas to "be taken out of the producing structures or formations" (*supra*, p. 25), and thus it, too, applied prior to the completion of production. The language in *Panoma* upon which the Kansas court relies refers only to the fact that the actual *sale* (in that case) to the interstate pipeline was made after production and gathering had ended; it has no bearing upon the incidence of the price-fixing order itself.

regulatory body which interferes with this jurisdiction is therefore proscribed.[12]

Also, the conflict between the Kansas order and the Commission's actual regulations is plain. As we have indicated (Point I, *supra*, pp. 14–15), the Commission in its Series "174" orders has regulated all prices charged by independent producers in selling natural gas to interstate pipelines. The Kansas order regulates precisely the same sales, by fixing a minimum price which must be charged for or attributed to all gas at the wellhead, regardless of the ultimate interstate destination of the gas. The direct and substantial effect of the Kansas order upon sales of natural gas in interstate commerce is demonstrated by the fact that it will increase appellant's gas costs by an estimated $4,000,000 per year (Appellant's Br. 7; R. 13–14, 86–87), an increase which will, if valid, be fully reflected in the cost of gas to the ultimate consumers (see *supra*, pp. 13–14, fn. 1).

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[12] The state, of course, has a valid interest in the conservation of its natural gas resources. But, as this Court early recognized, the protection of consumer interests "against exploitation at the hands of natural gas companies," which is the primary purpose of the Natural Gas Act, prohibits the use of price as a conservation measure. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, 613–614:

> Congress [in enacting the Natural Gas Act] was quite aware of the interests of the producing states in their natural gas supplies. But it left the protection of those interests to measures other than the maintenance of high rates to private companies. If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province.

There is no question of an accommodation of state and federal regulatory functions. It is well settled that "where the federal government, in the exercise of its superior authority * * * has enacted a complete scheme of regulation * * * states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines* v. *Davidowitz*, 312 U. S. 52, 66-67, and cases cited. Cf. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761. Here, the Federal Power Commission has undertaken to regulate all prices charged by producers making wholesales of natural gas in interstate commerce, and an attempt by the state to regulate the same prices must fall. The Court made clear in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. at 681, that "the jurisdiction of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control." [13]

Appellees argue (Motion to Dismiss or Affirm, p. 32) that the Kansas order is not a price-fixing order relating to appellant's interstate pipeline, but simply a "production" order which applies only to the inde-

[13] Moreover, this Court has repeatedly recognized that, in vesting the Federal Power Commission with jurisdiction over wholesales of natural gas in interstate commerce, the "basic purpose" of the Natural Gas Act was "to occupy" the entire field in which the state could not then act. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 609; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 683-684. The "gap" thus occupied, as it existed at the time of the Act's passage, included a prohibition against "state *minimum* price

pendent producers. For one thing, this argument overlooks the fact that these independent producers are themselves natural gas companies subject to regulation by the Federal Power Commission. We have shown the direct impact of this order upon the price of natural gas sold in interstate commerce for resale, a matter which the Power Commission alone is empowered to regulate. No clearer conflict could be envisioned than that in which a state minimum price is greater than a maximum rate imposed by the Commission. But even if the Kansas order is viewed as solely a "production" order, it clearly is invalid. Conditioning the production of natural gas which is to be sold in interstate commerce upon compliance with an attempted effort to fix the price of the gas is itself an improper interference with the exclusive right of the Federal Government to regulate sales of gas in interstate commerce. *Toomer* v. *Witsell*, 334 U. S. 385; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1. Cf. *Northern Natural Gas Co.* v. *Federal*

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orders, justified as conservation measures, applying to sales of natural gas in interstate commerce," *Phillips*, *supra*, 347 U. S. at 684; and regulation of sales in this area was therefore committed by the Act to the "exclusive regulation of the Fedral Power Commission." *Natural Gas Pipeline Co.* v. *Panoma Corporation*, 349 U. S. 44. The constitutionality of such state regulation has since been affirmed, *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, but, as stated in *Phillips Petroleum Co.* v. *Wisconsin*, *supra*, "the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce, in the absence of conflicting federal regulation." 347 U. S. 684. Cf. *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 247–248.

Power Commission, 206 F. 2d 690 (C. A. 8), certiorari denied, 346 U. S. 922, which recognizes that state regulation of price in producing areas is equivalent to fixing the price to the ultimate consumers in consuming states, and hence beyond the power of the state.

In short, no matter how it is viewed, the Kansas price-fixing order conflicts with the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act to regulate the rates charged by producers in making wholesales of natural gas in interstate commerce—a jurisdiction which the Power Commission is currently exercising (Appendix A, *infra*, p. 35 *ff*). The order is in all material respects identical to the Oklahoma order involved in the *Panoma* case, and is invalid.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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DECEMBER, 1957.

APPENDIX A

The extent to which the Federal Power Commission has implemented the Supreme Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, is revealed by the following data:

(1) *Statistics relative to independent producer filings from Federal Power Commission Press Releases:*

RELEASE FOR PUBLICATION

FEDERAL POWER COMMISSION

Immediate Release — Release No. 8959
G–4493

4,131 RATE INCREASES, TOTALING $57,472,400 PER YEAR, WERE FILED BY INDEPENDENT NATURAL GAS PRODUCERS IN FIRST 2½ YEARS FOLLOWING PHILLIPS DECISION, FPC REPORTS

WASHINGTON, D. C., February 5, 1957.—The Federal Power Commission received 4,131 rate increase filings, totaling approximately $57,472,400 annually, from independent producers of natural gas during the first 2½ years following the June 7, 1954, decision of the U. S. Supreme Court in the Phillips Petroleum Company case, Chairman Jerome K. Kuykendall reported today.

The figures, which the Chairman made public cover rate and certificate filings—between June 7, 1954, and December 31, 1956—made by the independent producers which were determined by the Supreme Court

in its Phillips decision to be subject to Federal Power Commission jurisdiction.

During this period the Commission received 7,738 certificate applications from independent producers and 5,839 of these had been disposed of as of December 31, 1956. During the year 1956 alone producers filed 1,255 certificate applications, while the Commission disposed of 3,501.

Of the filings for higher rates between June 7, 1954, and December 31, 1956, the Commission suspended 427 increases amounting to $32,841,800 per year. The FPC during this same period allowed without suspension 3,704 filings, for increased rates totaling approximately $24,630,600. These totals include 2,002 tax rate increases totaling $7,204,461 annually.

Sixty-nine of the suspended rate increases, totaling approximately $7,193,500 per year, were disposed of by the end of 1956. The Commission disallowed $3,855,100 of this total, allowed $3,268,100 while the remaining $70,300 was withdrawn. As of December 31, 1956, there were 358 rate increases under suspension and still pending, for $25,648,300 per year.

In addition to the rate increases, the Commission received 2,579 rate decreases amounting to about $2,928,600 annually. These included 2,566 tax rate decreases amounting to about $2,841,500. During the June 7, 1954–December 31, 1956 period the Commission received a total of 19,337 rate filings of all types from independent producers, including increases, decreases, new service, and other submittals. Approximately 5,500 rate filings were received during 1956 alone.

The tables on the back of this page show statistics relative to independent producer rate and certificate filings both at the end of the calendar year 1955 and at the end of 1956.

Statistics Relative to Independent Producer Rate Filings

	As of January 1, 1956		As of January 1, 1957		As of November 1, 1957‡	
	Number	Amount	Number	Amount	Number	Amount
Tax Rate Increases Filed and Allowed Without Suspension	1,891	$7,071,905	2,002	$7,204,461	2,475	$8,094,943
Other Rate Increases Filed and Allowed Without Suspension	1,069	13,359,225	1,702	17,426,113	2,256	22,041,535
Total Rate Increases Filed and Allowed Without Suspension	2,960	20,431,130	3,704	24,630,574	4,731	30,136,478
Rate Increases Suspended and Later Disposed of:						
Total	34	1,326,556	69	7,193,521	97	10,475,385
Amount Allowed	-------	1,273,609	-------	3,268,069	-------	3,351,847
Amount Disallowed	-------	----------	-------	3,855,097	-------	7,015,114
Amount Withdrawn	-------	52,947	-------	70,355	-------	108,424
Rate Increases Suspended and Pending	187	17,486,137	358	25,648,310	696	33,433,791
Total Rate Increases Suspended	221	18,812,693	427	32,841,831	793	43,909,176
Total Rate Increases Filed	3,181	39,243,823	4,131	57,472,405	5,524	74,045,654
Tax Rate Decreases Filed and Allowed Without Suspension	1,205	1,337,385	2,566	2,841,470	2,702	2,993,450
Other Rate Decreases Filed and Allowed Without Suspension	7	68,310	13	87,090	26	446,734
Total Rate Decreases Filed	1,212	1,405,695	2,579	2,928,560	2,728	3,440,184
Total Rate Filings Received	13,789	----------	19,337	----------	24,537	----------

‡Data for 1957 is compiled from Federal Power Commission Press Releases Nos. 8966, 9020, 9093, 9157, 9238, 9291, 9349, 9419, 9474, 9531 for each of the months of that year, with a correction for clerical error in the press release for June 1957, No. 9291.

Statistics Relative to Independent Producer Certificate Filings

	Total number of certificates	Grandfather certificates*	Certificates for new service
Filed June 7, 1954–Dec. 31, 1955	6,483	5,207	1,276
Disposed of June 7, 1954–Dec. 31, 1955	2,238	1,797	441
Pending Dec. 31, 1955	4,245	3,410	835
Filed in 1956	1,255	33	1,222
Disposed of in 1956	3,601	2,690	911
Pending Dec. 31, 1956	1,899	753	1,146
Filed Jan. 1, 1957–Nov. 1, 1957‡	1,198	122	1,076
Disposed of Jan. 1, 1957–Nov. 1, 1957‡	1,284	230	1,054
Pending Nov. 1, 1957‡	1,813	645	1,168

*Covering service already being rendered on June 7, 1954.

‡Data for 1957 is compiled from Federal Power Commission Press Releases Nos 8966, 9020, 9093, 9157, 9238, 9291, 9349, 9419, 9474, 9531 for each of the months of that year.

(2) ***Independent producer rate proceedings before the Federal Power Commission (through November 27, 1957) in which Commission opinions have been issued or examiners' decisions have become final:***

Union Oil Co. of Calif., et al., Opinion No. 300, issued 12/6/56, docket Nos. G–4331, et al., 16 FPC 100.

Davidor & Davidor, Examiner's decision issued 2/3/56, docket No. G–8550, reversed by Commission order 3/22/56, 15 FPC 1236.

Continental Oil Company, et al., Examiner's decision issued 4/24/56, docket Nos. G–6503, et al., modified and affirmed by Commission order 6/14/56, 15 FPC 735.

Christie, Mitchell & Mitchell, Examiner's decision issued 4/25/56, docket No. G–3669, affirmed by Commission order 6/29/56, 15 FPC 751.

Associated Oil and Gas Company, et al., Examiner's decision issued 8/14/56, affirmed by Commission order 2/6/57, 17 FPC 199, docket Nos. G–8519, et al.

Hunt Oil Company, Examiner's decision issued 8/15/56, docket No. G–9411, reversed by Commission order 12/3/56, 16 FPC 1292.

Sun Oil Company, et al., Examiner's decision issued 9/11/56, docket Nos. G–8288, et al., affirmed by Commission order 2/6/57, 17 FPC 174.

Crow Drilling Company, Inc., et al., Examiner's decision issued 10/19/56, docket Nos. G–6622, et al., affirmed by Commission order 2/6/57, 17 FPC 226.

Phillips Petroleum Company, Examiner's decision issued 11/29/56, docket No. G–10908, reversed by Commission order 4/5/57, 17 FPC 503.

William Negley, d/b/a Paisano Trading Company, Ltd., et al., Examiner's decision issued 1/15/57, docket Nos. G–8622, et al., modified by Commission order 4/22/57, 17 FPC 550.

Forest Oil Corporation, Examiner's decision issued 2/11/57, docket No. G–5510, affirmed in effect by order 4/26/57, 17 FPC 586.

H. F. Sears, et al., Examiner's decision issued 4/23/57, docket Nos. G–6502, et al., affirmed in effect by Commission order 9/3/57.

Delhi-Taylor Oil Corporation and Mayfair Minerals, Inc., Examiner's decision issued 5/1/57, docket No. G–6504, modified by Commission order 9/30/57.

Harper Oil Company, Examiner's decision issued 5/10/57, docket No. G–8715, adopted by Commission order 6/10/57, 17 FPC 803.

Southwest Gas Producing Company, Inc., et al, Examiner's decision issued 8/8/57, docket Nos. G–9611, et al.; became effective 9/9/57.

Shell Oil Company, Examiner's decision issued 8/9/57, docket No. G–12191, modified by Commission order 11/12/57.

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(3) *Independent producer certificate proceedings before the Federal Power Commission (through November 27, 1957) in which Commission opinions have been issued or examiners' decisions have become final:*

Deep South Oil Co., et al., Opinion No. 284, issued Sept. 9, 1955, docket No. G–2952, et al.

Dixie Pipe Line Co., et al., Opinion No. 285, issued September 9, 1955, docket No. G–2401, et al.

Anthony J. Tamborello, et al., Opinion No. 287, issued 11/28/55, docket No. G–3045, et al.

Anthony J. Tamborello, et al., Opinion No. 287–A, issued 1/20/56, 15 FPC 1, docket Nos. G–3045, et al.

Cities Service Gas Co., et al., Opinion No. 288, issued 11/28/55, docket Nos. G–2569, et al.

Continental Oil Co., Opinion No. 293, issued 9/20/56, 16 FPC 1, docket Nos. G–6349, et al.

Natural Gas Pipe Line Co. of America, et al., Opinion No. 299, issued 12/4/56, 16 FPC 80, docket Nos. G–4280, et al.

J. M. Huber Corp., et al., Examiner's decision issued June 15, 1955, docket Nos. G–3038, et al., affirmed by Commission order October 6, 1955.

Tide Water Associated Oil Company, Examiner's decision issued August 29, 1955, docket Nos. G–3718, et al. Became effective September 29, 1955.

Skelly Oil Co., et al., Examiner's decision issued Sept. 20, 1955, docket Nos. G–5380, et al. Proceeding terminated by Commission order, February 10, 1956, 15 FPC 1123.

Argo Oil Corporation, et al., Examiner's decision issued October 26, 1955, docket Nos. G–6810, et al., affirmed by Commission order January 25, 1956, 15 FPC 601.

Continental Oil Company, et al., Examiner's decision issued December 7, 1955, docket Nos. G–6590, et al., affirmed by Commission order 2/6/56, 15 FPC 627.

The Atlantic Refining Company, et al., Examiner's decision issued December 7, 1955, docket Nos. G–8809, et al., affirmed by Commission order December 30, 1955.

Sinclair Oil and Gas Company, et al., Examiner's decision issued February 10, 1956, docket Nos. G–9049, et al. Became effective March 12, 1956, 15 FPC 665.

Continental Oil Company, Examiner's decision issued March 8, 1956, docket Nos. G–6349, et al., modified and affirmed by Commission order July 23, 1956, 16 FPC 417.

Nelson Bunker Hunt Trust Estate, Examiner's decision issued May 8, 1956, docket Nos. G–4558, et al., affirmed by Commission order June 14, 1956, 15 FPC 743.

Montana-Dakota Utilities Co., et al., Examiner's decision issued May 8, 1956, docket Nos. G–9253, et al., affirmed by Commission order July 2, 1956, 16 FPC 401.

Continental Oil Company, Examiner's decision issued July 13, 1956, docket Nos. G–5795, et al., affirmed by Commission order 9/19/56, 16 FPC 451.

Saturn Oil & Gas Company, Inc., Examiner's decision issued September 21, 1956, docket No. G–5999, affirmed by Commission order 11/9/56, 16 FPC 461.

Continental Oil Company, et al., Examiner's decision issued March 29, 1957, docket Nos. G–11,024, et al., adopted by Commission order 6/24/57 with modifications, 17 FPC 880.

Continental Oil Company, Examiner's decision issued May 1, 1957, docket No. G–6346, reversed by Commission order 9/6/57.

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(4) *Independent producer rate proceedings before the Federal Power Commission under Section 4 of the Natural Gas Act (through June 30, 1957) in which final Commission orders without opinion have been entered:*

Docket No.	Name of Company		Commission Order
G–3176	Phillips Petroleum Co	2–7–56	15 F.P.C. 1116
3233	Humble Oil & Refining Co	12–7–54	----------
3820	Bridwell Oil Co	12–20–54	----------
3941	Arkansas Fuel Oil Co	12–20–54	----------
4016	M. H. Marr	12–20–54	----------
4017	Delta Gulf Refining Co	12–20–54	----------
4018	Taylor, O. & G. & Mayfair Minerals	12–20–54	----------
4019	Humble Oil & Refining Co	12–7–54	----------
4020	Arnold O. Morgan	12–7–54	----------
4330	J. C. Trahan, *et al*	12–7–54	----------
5642	Kerr-McGee Oil Industries	12–23–54	----------
8615	Sun Oil Co	8–21–56	16 F.P.C. 861
8634	Amerada Petroleum Co	5–10–56	----------
8636	Rudco Oil & Gas Co	6–7–56	----------
8993	A. W. Gregg	4–22–57	17 F.P.C. 550
9259	Stanolind Oil & Gas Co	12–30–55	----------
9309	Cities Service Gas Prod. Co	5–25–56	15 F.P.C. 1448
9310	J. M. Huber Corp	4–13–56	15 F.P.C. 1284
9416	J. M. Huber Corp	4–13–56	15 F.P.C. 1284
9509	Forest Oil Corp	4–11–57	----------
9592	Forest Oil Corp	4–11–57	----------
9597	H. L. Brown	10–4–56	----------
9598	Dolte Cheramie	10–4–56	----------

Docket No.	Name of Company		Commission Order
9599	Robert Mosbacher	10-4-56	
9600	Eunice J. Vinet	10-4-56	
9601	W. R. Wheeler	10-4-56	
9602	James L. Woods	10-4-56	
9607	John L. Abercrombie, *et al*	11-1-56	
10173	Sun Oil Co	8-21-56	16 F.P.C. 861
11653	The Chicago Corporation, *et al*	4-2-57	

(5) *Independent producer rate proceedings before the Federal Power Commission under Section 5 of the Natural Gas Act (through June 30, 1957) in which final Commission orders without opinion have been entered:*

Docket No.	Name of Company		Commission Order
8728	Cities Service G. Prod	5-25-56	15 F.P.C. 1448
9409	Northern Nat. Gas Producing Co	7-26-56	16 F.P.C. 803
8534	Phillips Pet. Co	2-24-56	
8688	La Gloria O. & G. Co	term. but no order	
8689	Continental Oil Co	term. but no order	

(6) *Decisions by United States Courts of Appeals reviewing Federal Power Commission orders in independent producer proceedings:*

(a) *Final orders in certificate proceedings:*

Sunray Mid-Continent Oil Co. v. *F. P. C.*, C. A. 10, 239 F. 2d 97, reversed, 353 U. S. 944.

Continental Oil Co. v. *F. P. C.*, C. A. 5, No. 16130, 6/29/57, 247 F. 2d 904.

J. M. Huber Corp. v. *F. P. C.*, C. A. 3, 236 F. 2d 550, certiorari denied, 352 U. S. 971.

Saturn Oil & Gas Co. v. *F. P. C.*, C. A. 10, No. 5582, decided November 20, 1957, Appendix B, *infra*.

(b) *Final orders in rate proceedings:*

Cities Service Gas Producing Co. v. *F. P. C.*, 233 F. 2d 726 (C. A. 10), certiorari denied, 352 U. S. 911.

Continental Oil Co. v. *F. P. C.*, 236 F. 2d 839 (dissent, 236 F. 2d 785 at 793) (C. A. 5), certiorari denied, 352 U. S. 966 (16 cases).

Deep South Oil Co. of Texas v. *F. P. C.*, 247 F. 2d 882 (C. A. 5).

Roy Lee, Trustee, Hussie Hunt Trust v. *F. P. C.*, 236 F. 2d 835 (C. A. 5) (dissent 236 F. 2d 785 at 793), certiorari denied, 352 U. S. 970.

Ralph Shank, Trustee, Nelson Bunker Hunt Trust Estate v. *F. P. C.*, 236 F. 2d 830 (C. A. 5) (dissent, 236 F. 2d 785 at 793), certiorari denied, 352 U. S. 790.

Phillips Petroleum Co. v. *F. P. C.*, 227 F. 2d 470 (C. A. 10), certiorari denied, 350 U. S. 1005 *sub nom. Michigan-Wisconsin Pipe Line Co.* v. *Phillips.*

(c) *Interlocutory orders in rate proceedings:*

Continental Oil Co. v. *F. P. C.*, 236 F. 2d 827 (C. A. 5) (dissent, 236 F. 2d 785 at 793).

Humble Oil & Refining Co. v. *F. P. C.*, 236 F. 2d 819 (C. A. 5) (dissent 236 F. 2d 785 at 793), certiorari denied, 352 U. S. 967.

Humble Oil & Refining Co. v. *F. P. C.*, 244 F. 2d 315 (C. A. 5) (1).

Humble Oil & Refining Co. v. *F. P. C.*, 244 F. 2d 315 (C. A. 5) (2).

Humble Oil & Refining Co. v. *F. P. C.*, C. A. 5, # 16505, et al., decided 6/28/57.

Hunt Oil Co. v. *F. P. C.* 236 F. 2d 828 (C. A. 5), (dissent, 236 F. 2d 785 at 793), certiorari denied, 352 U. S. 970.

Sun Oil Co. v. *F. P. C.*, 244 F. 2d 77 (C. A. 5).

Stanolind Oil & Gas Company v. *F. P. C.*, 236 F. 2d 824 (dissent 236 F. 2d 785 at 793) (C. A. 5).

Texas Gas Corp. v. *F. P. C.*, C. A. D. C. # 13751, decided Nov. 7, 1957.

Union Oil Company of Calif. v. *F. P. C.*, 236 F. 2d 816 (C. A. 5) (dissent 236 F. 2d 785 at 793), certiorari denied, 352 U. S. 969.

(f) *Orders suspending filed increased rate:*

CA5 No. 16212 *Sun Oil Company* v. *F. P. C.*

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(8) *Independent producer cases to which Federal Power Commission is a party now pending in the United States Supreme Court:*

On petition for certiorari to review affirmance of Commission order asserting jurisdiction over sale at or near the wellhead:

No. 449 *Shell Oil Company* v. *F. P. C.*

No. 459 *Humble Oil & Refining Company* v. *F. P. C.*

APPENDIX B

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 5582—November Term, 1957

SATURN OIL & GAS COMPANY, INC., PETITIONER, v. FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

Decided November 20, 1957

Before BRATTON, *Chief Judge,* and HUXMAN and BREITENSTEIN, *Circuit Judges.*

BREITENSTEIN, *Circuit Judge.*

Saturn Oil & Gas Company,[1] by its petition, seeks a review, pursuant to section 19 (b) of the Natural Gas Act,[2] of orders of the Federal Power Commission[3] which found that sales of natural gas by Saturn are sales in interstate commerce for resale and by reason thereof Saturn is a "natural-gas company" within the meaning of the Natural Gas Act. Saturn contends that it is not subject to the Act.

Saturn is a small unintegrated oil company which owns and operates natural-gas properties only in the State of Kansas. Saturn's production is from forty-five wells, forty of which are the subject of this proceeding. All of these wells are located in the Hugoton Field in the State of Kansas. In these wells Saturn

[1] Hereinafter referred to as Saturn.

[2] 15 U. S. C. § 717r (b). The Natural Gas Act is found at 52 Stat. 821–833, 15 U. S. C. §§ 717–717w.

[3] Hereinafter referred to as Commission.

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has varying interests. The gas is sold under long-term contracts to Panhandle Eastern Pipe Line Company[4] and to Northern Natural Gas Company.[5] Saturn has no affiliation or connection with either of these companies. Saturn does not now and never has served any community or any main line industrial consumer at wholesale or retail. It does not now and never has held itself out as being willing to serve the public generally.

The gas sales by Saturn are unusual in that the product is a very dry gas requiring neither processing nor dehydration to make it ready for transportation and consumption and in that the sales are at the wellhead.

Of the forty wells involved, thirty-four are owned jointly by Saturn and Panhandle and one well is owned by the same parties and by a third interest. These thirty-five wells are operated by Panhandle under an operating agreement which designates Panhandle as the operating manager with authority to purchase for itself or to sell to others the gas produced. There is a further agreement with Panhandle relating to the purchase of the gas. In the joint operating agreement the point of delivery is "at the mouth of the severally jointly owned wells." In the Panhandle purchase contract the delivery point is "at the wells.

Gas from the remaining five wells is sold by Saturn to Northern. The Northern purchase contract provides for delivery "at the points of connection of Northern's well-gathering pipe line with the side gate valves of Seller, installed on the wellhead of Seller's

[4] Hereinafter referred to as Panhandle.
[5] Hereinafter referred to as Northern.

wells." It is clear that all the sales by Saturn to Panhandle and to Northern are sales at the wellhead.

The report of the examiner, affirmed by the Commission, states, with reference to the facilities of Saturn and the delivery of gas by Saturn, that:

> Saturn owns no facilities beyond its "Christmas tree" at each well, with the exception, in some instances, of a few inches of pipe between the "Christmas tree" and the meter of the purchasing company. In the other instances the meters are attached to the "Christmas tree." All meters are owned by the purchasers. As a part of Saturn's "Christmas trees" at these wells there is a valve by means of which the flow of gas from the well and into the purchaser's meter may be controlled. These valves are operated by the purchasers of the gas. Saturn owns no pipelines, no processing or manufacturing plants, and no other type of natural gas facilities than those used in the production of its gas and the delivery thereof at the wellhead to Panhandle and Northern.

Panhandle and Northern are each interstate pipeline companies. After the delivery of gas by Saturn at the wellhead, either to Panhandle or to Northern, it is commingled in the pipelines of the purchaser with other gas which has been obtained from other wells in the Hugoton Field. A "substantial majority" of this commingled gas is transported in the pipelines of these two purchasers beyond the boundaries of Kansas and into other states for resale.

The proceedings before the Commission which gave rise to this petition for review were initiated by Saturn. By proper and timely filings in compliance with Federal Power Commission Order No. 174–A, Saturn requested the Commission to find that it is not a natural-gas company within the meaning of the Natural

Gas Act and was, therefore, entitled to continue its business without securing a certificate of public convenience and necessity. The examiner found that Saturn is a natural-gas company and that its sales of natural gas to Panhandle and Northern are subject to the jurisdiction of the Commission.[4] Saturn duly excepted to the decision of the examiner but its exceptions were denied by the Commission which affirmed the decision of the examiner. A petition for rehearing filed by Saturn was denied and the matter was brought here on petition for review. By permission of the court the attorneys for various oil and gas associations have been permitted to file a joint brief as amici curiae.

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[4] The examiner made the following findings and arrived at the following conclusions:

(1) Saturn is an independent producer of natural gas engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption and, by reason thereof, is a "natural-gas company" within the meaning of the Natural Gas Act and subject to the jurisdiction of the Commission under the Act.

(2) Saturn's sales of natural gas to Panhandle and Northern are made in interstate commerce, and together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Saturn is able and willing properly to do the acts and to perform the service for which a certificate is applied for by it, and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

(4) The sale of natural gas by Saturn to Panhandle and Northern herein described, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, is required by the public convenience and necessity, and a certificate therefor should be issued as hereinafter ordered and conditioned.

The basic question presented is whether natural-gas sales at the wellhead by a small unintegrated company to an interstate pipeline company for resale for ultimate public consumption are controlled by the Natural Gas Act.

Section 1 (b) of the Natural Gas Act[7] defines thus the area of applicability of the Act:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2 (6)[8] states:

> "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Saturn vigorously asserts that its wellhead sales are within the exemption contained in section 1 (b) because they are made prior to gathering. This position is made clear by the following paraphrase of section 1 (b):

> The provisions of this chapter * * * shall not apply * * * to the production or gathering of natural gas.

Production of gas is the act of bringing forth gas from the earth. Gathering of gas is the act of col-

[7] 15 U. S. C. § 717 (b).
[8] 15 U. S. C. § 717a (6).

lecting gas after it has been brought from the earth.[9] The Saturn sales are after the gas has been brought forth from the earth but they are prior to gathering in that the gas is sold before it is commingled with gas produced from any other source of supply and before it is processed, stored, or artificially pressurized.

The exact factual situation involved here has not as yet been passed on by the United States Supreme Court or by any court of appeals. In *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, the Commission found that the sales by Phillips "are part of the production and gathering process, or are 'at least an exempt incident thereof.' "[10] The court rejected this finding saying that "production and gathering, in the sense that those terms are used in § 1 (b), end before the sales by Phillips occur."[11] The physical operations present in the gas sales by Phillips were described by the court as follows:[12]

> The gas flows from the producing wells, in most instances at well pressure, through a network of converging pipelines of progressively larger size to one of twelve processing plants, where extractable products and impurities are removed. * * * After processing is completed, the gas flows from the processing plant through an outlet pipe, of varying lengths up to a few

[9] These definitions are from the dissenting opinion of Justice Black in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 518, but they are consistent with the meaning given these terms in the majority opinions in that case and in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 597–604, and in *Interstate Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 689–691.

[10] 347 U. S. 677.

[11] 347 U. S. 678.

[12] 347 U. S. 675.

> hundred feet, to a delivery point where the gas is sold and delivered to an interstate pipeline company. The gas then continues its flow through the interstate pipeline system until delivered in other states.

The Phillips decision thus involved a factual situation in which the sales were made after production and gathering.

In *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U. S. 44, the court in a short per curiam opinion said:

> In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, *after its production and gathering has ended,* by a company which transports the gas for resale in interstate commerce. We held in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, that *such* a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission. The *Phillips* case, therefore, controls this one. [Emphasis supplied.]

The Fifth Circuit has recently considered four cases[13] wherein that court upheld the jurisdiction of the Commission over natural-gas sales by producers to interstate pipeline companies. Those decisions are not reported as yet. Counsel have furnished us with a copy of the majority opinion and a copy of the dissenting opinion in one case, *Deep South Oil Co.* v. *Federal Power Commission.*[14] According to the copy

[13] *Deep South Oil Co. of Texas* v. *Federal Power Commission*, No. 15849; *Shell Oil Co.* v. *Federal Power Commission*, No. 15900; *Humble Oil & Refining Co.* v. *Federal Power Commission*, No. 15884; and *Continental Oil Co.* v. *Federal Power Commission*, No. 16130.

[14] In two of the cases, *Shell Oil Co.* v. *Federal Power Commission* and *Humble Oil & Refining Co.* v. *Federal Power Commission*, applications for certiorari have been filed with the United States Supreme Court and at this date have not been ruled on. See Docket Nos. 449 and 459, October Term, 1957.

of the opinion with which we have been supplied, Deep South is a small unintegrated corporation which produces gas from fourteen wells in the Big Hill Field of Texas and sells gas to the Texas Gas Corporation. In connection with such sale and delivery of gas the Fifth Circuit said:

> Prior to delivery under the contract, the "casinghead gas" is separated from the oil with which it is produced at a field separator, and the "full stream gas" is treated for the removal of water at a so-called "freewater knockout." Within a few feet from the point at which the gas leaves the aforementioned mechanical devices, it passes into Texas Gas' meters which are located on the leases near the wellheads from which the gas is produced. There it is measured and delivered and title thereto passes to Texas Gas.

The Deep South opinion does not make it clear as to whether there is any collection or gathering of the gas before it passes through the "field separator" or the "freewater knockout." We are not informed as to the factual situation in the Shell, Humble and Continental decisions of the Fifth Circuit.

The Phillips and Panoma cases involve sales after production and gathering. The Deep South case involves sales after a horizontal movement of the gas from the wellhead to a processing plant. So far as Saturn is concerned, the testimony is that the facilities owned by Saturn end with the several devices at the top of the well which are collectively known as the Christmas tree.[15] Delivery by Saturn is made into

[15] Howard R. Williams and Charles J. Meyers in their 1957 work "Oil and Gas Terms" define Christmas tree as "the assembly of valves, pipes and fittings used to control the flow of oil and gas from the casinghead."

the meter which is owned and operated by the purchaser and connects with Saturn's meter valves which are a part of the Christmas tree and may be used to cut off delivery. The president of Saturn, testifying as to the point of connection, said that Saturn had no properties beyond the Christmas tree except a line of a few inches to the meter and that in some instances the meter was attached directly to the Christmas tree.

In determining the effect of the factual difference which exists as to Saturn, consideration must be given to the Phillips decision. The court there states that the primary aim of the Natural Gas Act was the "[p]rotection of consumers against exploitation at the hands of natural-gas companies."[16] In connection with the exemptions contained in section 1 (b), the court quoted with approval its statement in *Interstate Natural Gas Co. v. Federal Power Commission, supra,* that "[e]xceptions to the primary grant of jurisdiction in the section [1 (b)] are to be strictly construed."[17] The court then went on to say that it based its decision in Interstate on the broad ground that "sales in interstate commerce for resale by producers to interstate pipeline companies do not come within the 'production or gathering' exemption."[18]

With reference to the intent of Congress the court said in Phillips that:[19]

> * * *, we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and *whether occurring before, during, or after trans-*

[16] 347 U. S. 685.
[17] 347 U. S. 679 quotes 331 U. S. 690–691.
[18] 347 U. S. 680–681.
[19] 347 U. S. 682.

mission by an interstate pipeline company. [Emphasis supplied.]

With further reference to the congressional intent, the court said:[20]

> * * * we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems.

In the Phillips case the court had before it the question of the jurisdiction of the Commission over sales of gas, after production and gathering had ended, in interstate commerce for resale. Rather than base its decision on the inapplicability of the production or gathering exemption, the court held that the Commission had jurisdiction over "all wholesales of natural gas in interstate commerce * * * whether occurring before, during, or after transmission by an interstate pipeline company."[21] In their concurring opinion on the adoption of the Federal Power Commission Order No. 174–B, Commissioners Smith and Stueck summarized thus the situation presented by the Phillips decision:[22]

> Depending upon whether prime emphasis is attached to the precise facts presented in the case of Phillips or to the broad language used in the dictum of the Supreme Court's opinion, arguments can be made for either of the extremes of possible interpretations of that decision: that our jurisdiction is limited to the sale of natural gas at the tailgate of the processing plant, or the point where the natural gas enters the interstate pipeline, or, in the alternative,

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[20] 347 U. S. 683–684.

[21] 347 U. S. 682.

[22] 4 Oil and Gas Reporter 919, reporting decision of Federal Power Commission dated December 16, 1954, in Docket Nos. R–137 and R–138.

that our jurisdiction extends to every wellhead sale in the field, or to the point of the first sale of natural gas for resale, wherever that may be, if interstate commerce turns out ultimately to be involved. Both interpretations have their advocates; both have been urged upon us.

Before stating our conclusions as to the effect of the Phillips decision certain other arguments of Saturn should be noted. One of these is that the Phillips decision is not a controlling precedent because it involved a large integrated company,[23] whereas Saturn is a small unintegrated company. This asserted distinction does not appeal to us. There is nothing in the Natural Gas Act which makes its applicability depend on the size or the integration of the gas operator. The Phillips decision holds that the Act applies to all wholesales by producers. Saturn may not escape regulation because of its size or because of the restricted nature of its operations.

Saturn further urges that the extension of the jurisdiction of the Commission to wellhead sales destroys the power of the states to exercise their constitutional power over the conservation of natural resources, a power which has been traditionally used to regulate the production and gathering of natural gas. Specifically, Saturn points out that Kansas, in the proper exercise of this power, has fixed a minimum wellhead price for natural gas produced from the Hugoton Field, the field involved in the Saturn operations now before the court. This minimum price

[23] An integrated oil company has been defined as a company engaged in all phases of the oil industry, from exploration for oil deposits to retail sale of oil products (including gasoline). These phases in outline are: exploration, production, transportation, manufacturing and refining, and retailing. See Oil and Gas Terms, supra, p. 128.

order has been upheld by the Kansas Supreme Court.[24] Most obviously there cannot be a dual control of wellhead sales by the State Corporation Commission of Kansas and by the Federal Power Commission. At the same time it may well be observed that a minimum wellhead price is an effective conservation control measure. Similar state action has been upheld in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190. But as observed in the Panoma decision,[25] those cases dealt with constitutional questions and not with the construction of the Natural Gas Act.

The conflict between federal and state authority is recognized in *Interstate Natural Gas Co.* v. *Federal Power Commission* wherein the court said:[26]

> Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach. But such conflict must be clearly shown. Excep-

[24] See *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P. 2d 528. This decision has been appealed to the United States Supreme Court and probable jurisdiction noted, 353 U. S. 971.

[25] 349 U. S. 45.

[26] 331 U. S. 690–691.

> tions to the primary grant of jurisdiction in the section are to be strictly construed. It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may in some degree be affected.

This would seem to dispose of the point. The jurisdiction of the Commission is not defeated by state regulatory action.

Saturn uses the above quotation from Interstate as the basis for the contention that the Act was never intended to apply to wellhead sales because such sales are made during production and gathering and are only technically consummated in interstate commerce. In this regard Saturn paints a sorry picture of the impact on the nation's economy of what it describes as a nationalization of the gas business. The brief of the amici curiae points out the hardships which will fall on the great group of independent gas producers if they are subjected to the drastic controls of the Natural Gas Act.[27] The argument, however, is not based on any constitutional ground. It goes merely to the wisdom of the Act. That is a question for Congress, not for the courts.

In the final analysis the question resolves itself into a determination of whether the Phillips decision is to be viewed in the light of its precise facts or in the light

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[27] If all sales of natural gas which are made before production and gathering have ended and which are for interstate transportation for resale are within the Act, numerous problems are presented. For example, must every royalty holder or working-interest owner who has the right to take gas in kind and who sells at the wellhead to an interstate pipeline company obtain a certificate of convenience and necessity and file a rate schedule? If this is necessary, the Federal Power Commission is faced with a tremendous administrative task.

of the broad language of the court. We are convinced that the court with full recognition of the precise facts, which it detailed in its opinion, carefully refrained from basing its decision on the inapplicability of the exemption and held that the production or gathering exemption of section 1 (b) did not apply to exclude from the jurisdiction of the Commission sales by any producer of natural gas for transportation interstate for resale to the public. We are bound by the Phillips decision.

Saturn says that this amounts to a nullification of the production or gathering exemption. We do not agree. In *Colorado Interstate Gas Co.* v. *Federal Power Commission* the court, in dealing with the contention that its disposition of the case gave no meaning to the production or gathering exemption of section 1 (b), said:[28]

> Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission.

In *Interstate Natural Gas Co.* v. *Federal Power Commission*[29] and *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*[30] the court recognized that effect must be given the production or gathering exemption. These cases and *Colorado Interstate Gas Co.* v. *Federal Power Commission*[31] are referred to in the Phillips decision as holding that the production or gathering exemption applies to the physical activities,

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[28] 324 U. S. 602–603.

[29] 331 U. S. 690.

[30] 337 U. S. 504–505.

[31] 324 U. S. 581.

facilities, and properties used in the production and gathering of natural gas and not to the business of production and gathering.[32] Until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such a sale the jurisdiction of the Commission applies but only because of the sale and only to the extent that the Natural Gas Act confers jurisdiction.

This brings us to the final contentions of Saturn. The decision of the examiner, affirmed by the Commission, provides:

> A certificate of public convenience and necessity is hereby issued to Saturn Oil & Gas Company, Inc., upon the terms and conditions of this order, authorizing the sale by it to Panhandle Eastern Pipe Line Company and Northern Natural Gas Company of natural gas in interstate commerce for resale, *together with the continued operation of any facilities necessary therefor and subject to the jurisdiction of the Commission,* all as more fully described in the record of this proceeding and the findings heretofore made. [Emphasis supplied.]

Saturn says that the effort to certify production facilities violates the production or gathering exemption. To us it is clear that facilities necessary to effect a sale of gas in interstate commerce are facilities used in intrastate commerce and are within the jurisdiction of the Commission. This would seem to be the plain intent of section 7 (c).[33] The Third Circuit has so held in *J. M. Huber Corp.* v. *Federal Power Commission,* 236 F. 2d 550, 556.

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[32] 347 U. S. 678, 681.

[33] 15 U. S. C. 717f (c).

The failure to identify the facilities is said to contravene the Fifth Amendment in that the definitive standards required by due process are absent. The record does not disclose any controversy as to whether any particular facility is within or without the jurisdiction of the Commission. Certainly Saturn is not injured when all the facilities necessary for its sales to Panhandle or Northern are certificates. The act of sale in interstate commerce for resale commits the facilities necessary to effectuate such a sale to regulation by the Commission to the extent of its jurisdiction. The test is whether the continued operation of a facility is necessary to the delivery of the gas sold. The generality of the certificate favors Saturn. The standard is ascertainable. It follows that there is no denial of due process.

Much of the argument by Saturn and by the amici curiae goes to the allegedly disastrous effect on the oil and gas business and on the national economy which will result from an affirmance of the Commission's order. This argument should be directed to Congress and not to the courts.

The petition for review is denied.

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